

[Cite as *State v. Owens*, 2010-Ohio-3353.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23623
Plaintiff-Appellee	:	
	:	Trial Court Case No.
	:	07-CR-3676
v.	:	
	:	
ROBERT LEE OWENS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 16th day of July, 2010.

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BROGAN, J.

{¶ 1} Robert Lee Owens, a registered sex offender, appeals from his conviction and sentence following a no-contest plea to charges of failing to notify of an address change and failing to verify his residence.

{¶ 2} Owens advances two assignments of error on appeal. First, he contends the trial court erred in overruling a motion to dismiss his indictment based on a speedy trial violation. Second, he claims the trial court erred in excluding from evidence a hearsay affidavit he sought to use during a hearing on the speedy trial issue. Alternatively, he claims the trial court erred in not granting a continuance and issuing a *capias* to have a subpoenaed witness brought to court to testify consistent with the affidavit.

{¶ 3} The record reflects that Owens filed a *pro se* “motion for fast and speedy trial” on November 28, 2007. At that time, he was being held in the Hamilton County jail on unrelated charges and had not yet been indicted in the present case. A grand jury indictment was filed against Owens on December 18, 2007, charging him with the offenses set forth above, and a warrant was issued for his arrest. For various reasons, however, the warrant and indictment were not served on Owens until more than one year later on December 22, 2008, when the Montgomery County prosecutor’s office discovered he was incarcerated at the Correctional Reception Center in Orient, Ohio. Owens was arraigned on December 23, 2008.

{¶ 4} On January 22, 2009, Owens filed a “second request for motion to dismiss speedy trial.” He argued that the State had violated his statutory and constitutional right to a speedy trial. The State opposed the motion, which the trial court overruled on April 15, 2009. Assisted by new defense counsel, Owens sought reconsideration and moved for a hearing on the speedy trial issue. He abandoned his statutory speedy trial argument while insisting that his Sixth Amendment speedy trial right had been violated. The trial court granted the request and held a July 6, 2009, hearing on the constitutional

issue. At the conclusion of the hearing, the trial court orally overruled Owens' motion. A July 8, 2009, entry confirmed that ruling. Owens subsequently entered his no-contest pleas. The trial court found him guilty and sentenced him to five years of community control. This appeal followed.

{¶ 5} In his first assignment of error, Owens contends the trial court erred in finding no Sixth Amendment speedy trial violation. His argument, which challenges the delay that occurred before the grand jury indictment was served on him on December 22, 2008, implicates the familiar four-part test set forth in *Barker v. Wingo* (1972), 407 U.S. 514. To determine whether a defendant's Sixth Amendment speedy trial right has been violated, a court must consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. *Id.* at 530.

{¶ 6} In analyzing the foregoing factors, the trial court found that the delay at issue was between eleven and twelve months, depending on how the time was computed. It characterized this delay as "not particularly long" and not presumptively prejudicial. The trial court attributed the delay to prosecutorial negligence at worst. It then noted that Owens had asserted his speedy trial right before his indictment but had not raised the issue again post-indictment until January 2009. The trial court expressed its belief that Owens should have renewed his motion sooner, perhaps in the spring, summer, or fall of 2008. Finally, the trial court found no actual prejudice to Owens as a result of the delay at issue. Based on these findings, the trial court held that Owens' Sixth Amendment speedy trial right had not been violated. (Hearing transcript at 83-88).

{¶ 7} On appeal, Owens primarily challenges the trial court's analysis of the first

Barker factor, the length of the delay. He argues that the relevant delay was more than twelve months and that it was presumptively prejudicial. To support his calculation, Owens proposes that we use one of three starting dates: (1) October 4, 2007, when a charge allegedly was filed against him in municipal court,¹ (2) November 28, 2007, when he filed his pre-indictment “motion for fast and speedy trial,” or (3) December 18, 2007, when a grand jury indictment was filed in the present case. The ending date in Owens’ computation is December 22, 2008, when the indictment was served on him. Under any of these three computations, Owens notes that the disputed delay exceeded twelve months.

{¶ 8} In *State v. Bailey*, Montgomery App. No. 20764, 2005-Ohio-5506, ¶10, we recognized that “the first *Barker* factor, the length of the delay, performs a gate-keeping function, insofar as a delay approaching one year typically is required to establish ‘presumed prejudice,’ the existence of which is necessary to trigger an inquiry into the other three factors.” Having reviewed the record, we agree with Owens that the disputed delay here was sufficiently long to establish presumed prejudice and to warrant a full, four-part *Barker* analysis. In our view, the most relevant time period was from December 18, 2007, when he was indicted, through December 22, 2008, when the indictment was served on him. This time period was just over one year. But even under the State’s proposed computation, the delay at issue was only a week short of twelve months, which qualifies as a delay approaching one year.² Therefore, the delay was

¹To support using the October 4, 2007 date, Owens provided the trial court with a hearsay affidavit, which is the subject of his second assignment of error.

²The State urges us to consider the time from December 18, 2007, the date of Owens’ indictment, through December 11, 2008, when a detainer allegedly was placed

presumptively prejudicial, and it triggered an analysis of the other *Barker* factors.³

{¶ 9} Although the length of the delay in this case exceeded twelve months, the first *Barker* factor carries little weight for Owens. In *State v. Triplett*, 78 Ohio St.3d 566, 1997-Ohio-182, the Ohio Supreme Court recognized that a fifty-four-month delay was more than adequate to establish presumed prejudice and to trigger a review of the other *Barker* factors. The *Triplett* court then added: “However, the delay in this case, while significant, did not result in any infringement on Triplett's liberty. In fact, according to her own testimony, she was completely ignorant of any charges against her. The interests which the Sixth Amendment was designed to protect—freedom from extended pretrial incarceration and from the disruption caused by unresolved charges—were not issues in this case. Therefore, while the first factor does technically weigh in Triplett's favor, its weight is negligible.” *Id.* at 569.

{¶ 10} The record supports the same conclusion here. During the speedy trial hearing below, Owens explained that he filed his pre-indictment November 28, 2007, speedy trial motion because his girlfriend told him there was a warrant for his arrest in Montgomery County. (Hearing transcript at 5). During the ensuing period of delay at issue, however, Owens admittedly had no knowledge of the December 18, 2007, indictment against him. He testified that he was unaware of any pending charges, as he believed they had been dismissed. (*Id.* at 48). The record further reflects that Owens was incarcerated, first in Cincinnati and later at the Correctional Reception Center, on

on him at the Correctional Reception Center.

³Even though the trial court found no presumptive prejudice, its error was harmless because it proceeded to make specific findings on all four *Barker* factors anyway.

unrelated charges. Therefore, as in *Triplett*, the interests the Sixth Amendment was intended to protect were not implicated in Owens' case. As in *Triplett*, then, the first *Barker* factor, the length of the delay, weighs only negligibly in Owens' favor.

{¶ 11} As for the second *Barker* factor, the reason for the delay, the record supports the trial court's finding of nothing beyond prosecutorial negligence. In the proceedings below, the prosecutor attempted to explain the delay in a written brief and during the speedy trial hearing. Defense counsel objected to the explanation, arguing that the prosecutor's statements were not evidence. But even if we ignore the prosecutor's explanation for what happened, the remaining record fails to reveal anything worse than negligence by the prosecutor's office.

{¶ 12} Owens admitted that he was in the Hamilton County jail at the time of his December 18, 2007 indictment. He explained that he was transferred to the Correctional Reception Center on January 15, 2008. Before the transfer, the trial court filed a December 18, 2007 entry, order, and warrant for removal, directing the Montgomery County sheriff to transport Owens from the Hamilton County jail for a January 8, 2008 arraignment on his indictment. Despite the order, Owens was not transported. Thereafter, on December 26, 2007, the trial court filed a similar order, directing the Montgomery County sheriff to transport Owens from the Chillicothe Correctional Institution for arraignment. Owens testified, however, that he never was at the Chillicothe Correctional Institution. As a result, he was not transported. Whatever the reason, the prosecutor's office admittedly lost track of Owens until discovering his incarceration at the Correctional Reception Center in December 2008. During the speedy trial hearing, Owens asserted that the prosecutor's office easily could have

located him using a computer.

{¶ 13} Addressing the cause of the delay during the speedy trial hearing, the trial court found that Owens' assertion and the existing record indicated at most negligence by the prosecutor and not intentional, bad-faith delay. We agree. "Although such governmental negligence does not weigh as heavily as a deliberate attempt to delay a trial, 'it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.'" *Bailey*, supra, at ¶14, quoting *Doggett v. United States* (1992), 505 U.S. 647, 657. Therefore, the second *Barker* factor, the reason for the delay, tips in Owens' favor.

{¶ 14} The third *Barker* factor concerns whether and how Owens asserted his speedy trial right. As set forth above, Owens initially asserted his right on November 28, 2007 before even being indicted in this case. He did not assert his right again until he filed a second speedy trial motion on January 22, 2009. Therefore, Owens never asserted his speedy trial right *during* the delay at issue, which spanned from December 18, 2007, when he was indicted, through December 22, 2008, when the indictment was served on him. Owens provided uncontroverted testimony, however, explaining that he was unaware of the charges against him throughout this time period. (Hearing transcript at 48). As a result, his failure to raise a speedy trial issue during the delay cannot be held against him. *Bailey*, supra, at ¶15, citing *State v. Tharp* (June 22, 1994), Montgomery App. No. 14155.

{¶ 15} The final *Barker* factor requires consideration of the actual prejudice to Owens as a result of the roughly twelve-month delay between his indictment and service of the indictment on him. "In *Barker* and *Doggett*, the Supreme Court identified

three types of prejudice that may arise from a lengthy delay: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility that the accused's defense will be impaired by dimming memories and the loss of exculpatory evidence." *Bailey*, supra, at ¶16 (citations omitted). The first two types of prejudice are not implicated in Owens' case. He was incarcerated on unrelated charges out of Hamilton County, and he was not even aware of the Montgomery County indictment. As for the third type of prejudice, the prosecutor asked Owens about potential impairment of his defense due to the delay. In response, Owens testified that he did not know of anyone other than "maybe a parole officer" who might be a witness. (Hearing transcript at 47). He had not even started to think about his defense. (*Id.* at 50). In short, the record reveals no potential for the delay to impair Owens' ability to defend against charges of failing to notify of an address change and failing to verify his residence.

{¶ 16} As we pointed out in *Bailey*, however, "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Bailey*, supra, at ¶19, quoting *Doggett*, 505 U.S. at 655. "When considered as 'part of the mix of relevant facts,' the presumptive prejudice that arises from a lengthy delay may be sufficient to support a finding of a speedy trial violation." *Id.*, quoting *Doggett*, at 656. But "to warrant granting relief, [governmental] negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing prejudice." *Id.*, quoting *Doggett*, at 657. "Thus, where delay attributable to the negligence of the State is more than one year (i.e., 'presumptively prejudicial' under the first *Barker* factor), but not exceedingly long like the eight-and-one-half years at issue in *Doggett*, courts sometimes decline to find a speedy trial violation absent actual prejudice to the defendant." *Id.* The

record supports such a conclusion in Owens' case.

{¶ 17} The disputed period of delay in Owens' case is approximately one year, which barely even reaches the threshold needed to trigger a full *Barker* analysis. While this delay weighs in his favor, we explained above that its weight is negligible because the interests the Sixth Amendment protects were not implicated in this case. The record also does not suggest that the delay was due to anything worse than prosecutorial negligence. Finally, although Owens timely asserted his speedy trial right, the record contains no evidence of any actual prejudice as a result of the challenged delay. Owens' hearing testimony indicates an absence of prejudice. On these facts, as in *Bailey*, our review of the *Barker* factors leads us to conclude that Owens' Sixth Amendment speedy trial right was not violated. Accordingly, the first assignment of error is overruled.

{¶ 18} In his second assignment of error, Owens contends the trial court erred in excluding from evidence a hearsay affidavit he sought to use during the speedy trial hearing. Alternatively, he claims the trial court erred in not granting a continuance and issuing a *capias* to have a subpoenaed witness brought to court to testify consistent with the affidavit.

{¶ 19} The affidavit, which is part of the record, was provided by Kim Snow, an employee of the Hamilton County sheriff's office. Snow did not attend the hearing below. Owens attempted to use her affidavit, however, to establish that the Hamilton County sheriff's office received a detainer for him from Montgomery County on October 4, 2007. According to Snow, the detainer indicated that Owens was wanted in Montgomery County "for a charge of Notify/Failure to Verify Address." Owens cited

Snow's affidavit and argued below that the starting date for the time computation should be October 4, 2007 rather than December 18, 2007, which was the date of his grand jury indictment. The trial court sustained a hearsay objection to the affidavit and excluded it from evidence.

{¶ 20} On appeal, Owens relies on Evid.R. 101(C)(3) and (7) to support his argument that the rules of evidence do not apply to a hearing on a speedy trial motion. Rule 101(C)(3) provides, with an inapplicable exception, that the rules of evidence do not apply to “[p]roceedings for extradition or rendition of fugitives; sentencing; granting or revoking probation; proceedings with respect to community control sanctions; issuance of warrants for arrest, criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise.” Owens has failed to identify which of the foregoing categories he believes include a hearing on a speedy trial motion. In our view, none of them apply to such a proceeding.

{¶ 21} Evidence Rule 101(C)(7) provides, with the same inapplicable exception, that the rules of evidence do not apply to “[s]pecial statutory proceedings of a non-adversarial nature in which these rules would by their nature be clearly inapplicable.” The trial court’s speedy trial hearing does not appear to have been a statutory proceeding, and a review of the transcript reveals that it was certainly adversarial. Moreover, there was nothing about the hearing that would make rules of evidence clearly inapplicable by their nature. Therefore, Evid.R. 101(C)(7) has no applicability.

{¶ 22} Although Owens has failed to show error in the trial court’s ruling, the exclusion of Snow’s affidavit was harmless in any event. Even if we adopted October 4,

2007, rather than December 18, 2007, as the starting date for our time computation above, we would reach the same conclusion on the speedy trial issue. Using either starting date, a delay of more than twelve months exists, resulting in presumed prejudice and the need to conduct a full *Barker* analysis. If we used the October 4, 2007 date, the disputed delay would be roughly fourteen-and-one-half months rather than approximately twelve months. This difference would not alter our analysis of the four *Barker* factors or change our ultimate conclusion.

{¶ 23} For the same reason, the lack of a continuance did not prejudice Owens. Even if we assume, purely arguendo, that the trial court should have ordered a continuance so a subpoenaed Hamilton County employee could be arrested and forced to testify consistent with Snow’s affidavit, her averments about the issuance of a detainer on October 4, 2007 would not change the outcome of our speedy trial analysis even if those statements had been made in person rather than through an affidavit. Accordingly, we overrule Owens’ second assignment of error.

{¶ 24} The judgment of the Montgomery County Common Pleas Court is affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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